rather than "irreparable injury," the Commission should look to whether there is a "substantial likelihood of competitive harm"if the cease and desist order is not granted. Indeed, it should be sufficient that a competitor's position in the marketplace will be adversely affected to the benefit of the carrier.

In addition, the requirement of a bond should be carefully scrutinized. This is particularly so where, as in many cases, the common carrier defendant is being directed to cease refusing service or interconnection, -- i.e. is being directed to provide service for which the complainant will pay. Requiring a bond of complainant in these circumstances would be a double payment and inequitable.

I. Bifurcation

The bifurcation of the damage issue through the voluntary supplemental complaint process provides a time and expense savings to the parties and the Commission. This process gives the complainant the option of going forward with its entire case or resolving the liability issue first, with more limited cost exposure.

At the same time, complainants will not choose bifurcation, which eases the workload on all concerned including Commission staff, unless they can be assured that their damages claims will be

promptly resolved. Prompt adjudication under statutory deadlines of substantive issues is of little avail if complainants fear they may have to wait an extended period of time for their damages.

The supplemental complaint process for the damage issue should be resolved in no more than 90 days, with comprehensive damage discovery being permitted on an expedited basis.[12] This resolution deadline will encourage complainants to adopt the bifurcation process, and as pointed out in the NPRM, bifurcation will also provide additional opportunities for settlement through mediation or arbitration.

The parties should also have the option of submitting the damage issue to an administrative law judge, designated for the purpose of ascertaining damages. The appointment of Special Masters for that purpose in federal court has proved to be highly successful in encouraging and effectuating settlements.

J. Replies

While the concept that less paper work is generally better for all is often sound, the proposal to eliminate complainant's reply, if adopted, will likely generate more paper rather than less. Practical litigation experience dictates that defendants

[12]A five month complaint process, if bifurcated, should also be resolvable in 90 days when only the issue of damages remain.

answer will include "new" issues, facts or arguments that cannot go unanswered.[13] This will result in additional briefs in the form of motions for leave to file a reply, together with supporting memoranda, which the staff will have to devote time to, rather than to the merits of the case. Replies should continue to be permitted to avoid additional time consuming motions.

K. Motions

The proposed changes concerning motions are desirable. In addition, because of the compression of the time table to file oppositions, the proponent of a motion should be required to give notice by facsimile to opposing parties as soon as the proponent begins to prepare the motion and should provide an estimate of the filing date. Further, because extraordinary circumstances will arise from time to time, amended complaints should be the subject of a motion for leave to amend rather than an absolute prohibition.

L. Joint Statement

The Commission's efforts to shorten the deadlines to reach mandated resolution dates are commendable. But the proposal to require the parties to submit a joint statement of stipulated facts

[13]As a practical matter, virtually all complainants may feel the need to seek leave to file a reply to make sure all bases are covered and to eliminate the possibility of inadvertently leaving an assertion unanswered.

and key legal issues five days after the answer is filed will be overly burdensome for the parties and may be unnecessary.[14] The five day limitation will not afford adequate time for complainant to analyze defendant's pleadings and documentary submissions and for the parties to meet and reach agreement on the relevant facts and draft a submission acceptable to all parties. In many instances agreement on what the relevant facts are is a major hurdle and cannot be accomplished without thought and analysis. As an alternative, each party should be prepared with a list of facts to which it is willing to stipulate and be prepared to discuss the relevant facts and key legal issues at the initial status conference -- to be held 10 business days following the filing of the answer.[15] Staff would be in a position to assist in facilitating a stipulation.

M. Briefing

If adopted, the proposal to eliminate briefing in those cases

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[14]It should be noted that the "stipulation" in E.D. Va. R. 13 referred to in the NPRM is prepared shortly before trial, after discovery is closed, and long after the initial pleadings are filed.

[15]Consideration should be given to utilizing the track approach adopted by many court systems. See for example, D.C. Superior Court Rule 16. (Discovery and briefing schedules are assigned predetermined time periods, depending on the complexity of the case.)

where discovery is not conducted would put complainants at a distinct disadvantage. This procedure would require complainant to file findings of fact and conclusions of law -- in place of briefing -- without knowing the legal and factual positions of the opposition.[16] This task cannot reasonably be accomplished without some opportunity to analyze the opposition's factual positions and legal arguments. Post complaint briefing should be continued to allow the parties to develop an adequate record.

The staff should request the parties to brief the issues staff deems important to the resolution of the complaint. However, the parties must be permitted to include in their respective briefs those issues which the parties consider to be important, even though not included in the staff's request.

While the proposal to limit initial briefs to 25 pages and reply briefs to 10 pages may prove to be adequate for some cases, more complex cases cannot, as a practical matter, be properly briefed with such limitations. ICG suggests that the best record can be developed if a three brief process is adopted, as follows: Initial brief - 35 pages; Opposition - 20 pages; Reply brief - 10

[16]While some information will come from pre-filing negotiations, there is no certainty that this information will be complete and accurate to such an extent that the entire case can rest on it.

pages. The foregoing will permit issues (especially complex ones) to be fully briefed and will ultimately benefit all. While this means a few more pages of briefs, an extra fifteen or twenty pages of briefs will not over-burden the Commission's processes, but will provide for full illumination of the issues.

ICG recognizes the need to impose shorter briefing schedules to meet complaint resolution deadlines. However, a standardized timetable for briefing would give the parties the requisite certainly to permit adequate planning and preparation of briefs. This certainty in schedule will produce a better work product and will be beneficial to the parties and staff. The staff should retain the discretion to direct changes in the standard schedule where needed to meet statutory deadlines.

ICG suggests the adoption of the following standard briefing schedule: initial brief - 85 days after filing of the complaint; Opposition brief - 15 days after initial brief; reply brief - 10 days after the Opposition brief.

N. Sanctions

As discussed above, the Commission should adopt and use sanctions available to ensure the efficient disposition of cases in accordance with the Act. Recognizing, of course, that industry participants must get acquainted with and accustomed to the new

rules, these sanctions should include summary disposition, striking all or parts of pleadings and forfeitures in appropriate cases.

O. Final Action

Section 271(d)(6)(B) requires that the Commission "act on" complaints concerning a BOC's failure to continue to meet conditions required for approval to provide in-region interLATA services and the imposition of any applicable sanctions. The NPRM proposes to interpret "act on" to mean Bureau rather than Commission action. However, Bureau action is not final action by the full Commission. 47 U.S.C. § 155(C).

As discussed above, once the RBOCs are granted authority to provide in-region interLATA services, much of the incentive they currently have to comply with Section 251 will be vitiated. The Commission's power to compel BOC compliance with the competitive checklist or suspend or revoke the BOC's authority is one of the most important remedies afforded by the Act. The NPRM notion that Congress might have intended less than full Commission resolution of allegations of a BOC's failure to continue to meet those obligations is simply inconsistent with the entire tenor of the Act. It is unfair to complainants and the BOCs alike not to have speedy resolution by the full Commission of allegations of this sort, with the attendant rights of judicial review. Had Congress

intended to allow the staff to "act on" the complaint, it would have so stated.

On the basis of the foregoing, ICG respectfully requests that the Commission consider its comments and adopt the proposed text and rule changes discussed above.

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Respectfully submitted,

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